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KYSC1976-SC-0092-01

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APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-92

RICHARD MOONEY

APPELLANT

VS.

APPEAL FROM KENTON CIRCUIT COURT
HON. MELVIN T. STUBBS, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT**FILED**

APR 7 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURTJACK EMORY FARLEY
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COMMONWEALTH OF KENTUCKY
625 LEAWOOD DRIVE
FRANKFORT, KENTUCKY 40601Vincent D. Giovanni
VINCENT D. GIOVANNI
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed postage prepaid, to Hon. Melvin T. Stubbs, Judge, Kenton Circuit Court, Kenton County Courthouse, Covington, Kentucky 41011; Hon. Frank O. Trusty, Commonwealth Attorney, 16th Judicial District, Covington, Kentucky 41011; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 7th day of April, 1976.

Vincent D. Giovanni

4382

SUPREME COURT OF KENTUCKY

FILE NO. 76-92

RICHARD MOONEY

APPELLANT

VS.

APPEAL FROM KENTON CIRCUIT COURT
HON. MELVIN T. STUBBS, JUDGE

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* * * * *

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTION PRESENTED.

ARE THE ERRORS COMMITTED BY THE TRIAL
COURT SUFFICIENTLY PREJUDICIAL TO RE-
QUIRE REVERSAL OF THE APPELLANT'S
CONVICTION?

STATEMENT OF THE CASE

The Appellant, Richard Mooney, was indicted by the Kenton County Grand Jury on a charge of armed robbery in violation of KRS 433.140. He was also charged as a habitual criminal in violation of KRS 431.190 (T.R., p. 1). The Appellant was arraigned on February 2, 1975 and entered a plea of not guilty (T.R., p. 1). The Appellant moved to dismiss the prosecution against him on May 13, 1975 on the grounds that he had been denied a speedy trial (T.R., p. 2). The motion to dismiss was overruled in a pretrial hearing just before the commencement of the trial (T.E., p. 13). The case was presented to the jury on July 13 and

August 1, 1975 (T.E., p. 1). At the conclusion of their deliberations the jury returned a verdict of guilty and fixed punishment at twenty years (T.R., p. 6). Count II of the indictment, the habitual criminal charge, was dismissed on the Commonwealth's motion (T.R., p. 10).

The Appellant filed a motion for new trial on August 5, 1975, which was overruled on August 8, 1975 (T.R., pp. 7, 8). Final judgment was entered on September 24, 1975 (T.R., p. 9). Appellant filed his notice of appeal on September 29, 1975 (T.R., p. 13).

On appeal of the conviction, appellate counsel and the Appellant were unable to agree upon the procedure to be followed in the case. The Appellant decided to file his brief on appeal pro se. Therefore on March 8, 1976, the Appellant moved through counsel for an extension of time of thirty days in order to allow for the filing of the pro se brief. On March 26, 1976, this Court entered an order granting leave to file a pro se brief and extending the time to file said brief to and including April 7, 1976. However, on April 2, 1976, counsel was informed by the Appellant that he no longer wished to file a pro se brief, and now wished counsel to file the brief that was originally suggested to the Appellant.

Therefore, the Appellant now tenders the following brief in accordance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Other facts which are material and necessary to the proper consideration of this appeal will appear in the argument below.

ARGUMENT

THE ERRORS COMMITTED BY THE TRIAL COURT ARE NOT SUFFICIENTLY PREJUDICIAL, IN THE OPINION OF APPELLATE COUNSEL, TO REQUIRE THIS COURT TO REVERSE THE APPELLANT'S CONVICTION.

Counsel has carefully reviewed the evidence and the record of this case. Counsel has been unable to find a single error which, in his opinion, would require reversal of the Appellant's conviction. The only error which has arguable merit is the possible failure to afford the Appellant a speedy trial in accordance with Amendment Six of the United States Constitution.

The crime charged against the Appellant was committed and the Appellant arrested on November 4, 1974 (T.R., p. 1). The indictment was returned on February 4, 1975 (T.E., p. 13). The Appellant was not tried until July 31, 1975, almost nine months after the offense. Under authority of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) and Johnson v. Commonwealth, Ky., 514 S.W.2d 115 (1974), two of the factors which are important in determining whether there was a denial of the right to speedy trial are the defendant's assertion of the right and the prejudice to the accused.

The Appellant first asserted his right to a speedy trial on May 13, 1975 (T.R., p. 2). He was tried on July 31, 1975, approximately 2 1/2 months later. Counsel agrees with the statement of the Assistant Commonwealth Attorney, that this was a most reasonable delay (T.R., p. 13). Trial counsel did not demonstrate and appellate counsel can not demonstrate that the Appellant suffered prejudice from the nine months delay from arrest to trial. In addition, this Court found in Johnson that a ten month delay did not deny the right to a speedy trial.


The quantum of evidence against the Appellant was substantial. The Appellant was clearly identified by the proprietor of the store as the party who held the gun on him during the robbery (T.E., pp. 18, 19). The Appellant admitted his presence in the store during the robbery (T.E., pp. 118-119). The Appellant was apprehended immediately after the robbery during a futile attempt to flee the scene (T.E., pp. 46-50). A review of the record will reveal much additional evidence corroborative of the fact of the Appellant's guilt.

Therefore, appellate counsel is of the opinion that the arguable errors in this case, do not merit reversal of the conviction.

CONCLUSION

For the reasons stated above and in accordance with Anders v. California, supra this Court should now review the record and reach a conclusion whether the Appellant's case contains errors which would require reversal of the Appellant's conviction below. A copy of this brief has been sent to the Appellant.

Respectfully submitted,



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